

TRYALL and PLEA

OF

JAMES Earle of *DERBY*, Prisoner
of War, before a Court Martiall at *Chester*, *Octob. 1. 1651.*

The Articles were severall particulars of Treason, by his
Invading *ENGLAND*, raising Forces, &c.

The Answer is a confession of the fact.

The Plea is a Plea of Quarter, which he conceives to be
a good Bar to a Tryall for Life, by Court-Martiall or
Councell of War, though not against a meer Civill
Judicature.

His Plea was over-ruled by the Court upon this account,
That the Court Martiall was directed by Parliament. So
that the Court proceeded to Sentence, on'y gave him
a fortnights time from the first of October.

From this Sentence he appealeth to his Excellency the Lord
Generall.

2 Kings 6. 21, 22.

*And the King of Israel said to Elisha when he saw them, my Father
shall I smite them? shall I smite them?*

*And he answered, thou shalt not smite them, wouldest thou smite
those whom thou hast taken Captive with thy Sword, and with thy
Bow.*

MAY 28, 1913

SUBSCRIPTIONS TO
ENGLISH HISTORICAL



THE
 Charge and Articles
 OF
 HIGH-TREASON

AGAINST

The Earl of Derby, with the Tryal, examination, and Confession, on Tuesday and Wednesday, before a Court-Marshal at Chester.

UPON the 16th of this instant moneth, by an extraordinary Messenger from *Chester* it is advertized, That the Earl of *Derby* was brought before the Court-Marshal, consisting of Col. *Duckenfield* and 15 Commission-Officers, where the Judge Advocate brought in, and read the Charge against him, consisting of High-Treason, viz.

1. That he had in a most traiterous and hostile manner, been aiding,abetting, and assisting to *Charles Stuart* (Son to the late Tyrant.)
2. That he had held correspondence and confederacy with the said

Charles Stuart, and his accomplices; and to the utmost of his power, indeavoured the subversion and extirpating of this present Government; as also the violating and abolishing the Law and Discipline, so happily by them established.

3. That he had trayterously indeavoured to involve this *NATION* in another bloody and intestine War, by issuing forth and sending Warrants in *Lancashire*, and summoning in the people to a *Randevouz*.

4. That he had most traiterously appeared in the head of a party, both in *Cheshire*, *Lancashire*, and other places within this Nation, and granted Commissions, signed *C. R.* [being a sigal used by the grand enemy of this Common-wealth] to divers Gentlemen, Papists, and others, for the raising of forces against the Parliament, &c. The Judge Advocate having read the Charge, his Lordship made a short Speech in answer thereunto, to wit, That he had not acted in the least, contrary to the Commands of his Master the King; but what he had done, was in order and obedience to the power and Instructions from him received.

After which *Col. Duckenfield* and the rest of the Council, proceeded to examination, and stated the matters of fact, consisting of High-Treason; which caused his Lordship to look very pensively, and moved him so far, that he would fain do something which might be considered, and himself in it; and withall, declares a good inclination to deliver up the Isle of Man, to the present power; only here lies a scruple, That he is afraid it will be imputed as a very ignoble and dishonourable thing, to surrender up his Children and Lady in it. But after some time spent in this business, the Council referred the further proceedings in his Trial until another time.

The matters of fact exhibited against him, are of a very high nature, and its probable may draw a severe sentence upon him: divers other persons of quality there are which were engaged also in this treasonable design, who are likewise to be brought to the Bar of Justice: Therefore I conceive it requisite, to present to the free-born people of this Nation: certain Rules and Proposals, shewing the happiness and joy that will redound to all those at the hour of death that walke stedfastly in the wayes of Holiness; and the misery and torments that will befall on the contrary, to those that are opposers, and lick against the Ordinances thereof. An evident demonstration whereof followeth.

The

The Substance of the Earle of Derby's Speech to enforce his plea.



Understand my self to be Convented before you, as well by a Commission from the Lord Generall, as by direction of an Act of Parliament of the 12th. of *August* last.

To the Articles I have given a full and ingenuous Answer, what may present it selfe for my advantage, I have gained liberty to offer and urge by Advice.

And I doubt not but in matter of Law the Court will be to me instead of Counsell in Court.

Sir, I shall first observe to you the nature and generall order of a Court Martiall, with the Lawes and Axiomes of it, as far as concerns my Case, and then shall apply my plea to such Orders, &c.

And therefore I conceive (under favour) that the Laws of a Court Martiall, are as the Laws of Nature and Nations, equally binding all persons, and in all places Military, and to be observed inviolably.

And therefore it is, if a Judgement be given in one Court Martiall, there is no appeal to any other Court Martiall.

Of which Law Martiall, the Civill Law gives a plentifull Account, far above what the Common Law doth; as *Grotius de iure belli*, &c.

But because it is one onely point of Martiall Law, which I am to insist upon for my life, --- I shall name it, and debate the *Jus*, the right of it, --- It is Quarter for life given me by Captain *Edge*.

Which I conceive to be a good bar to avoid tryall by a Councell of War for Life.

That you are a Councell of VVar, will be admitted, and being so, that you must judge and proceed to Laws of VVar, and no otherwise, cannot be denyed.

That Quarter was given me, if it be scrupled, I am ready to prove, and being given, that it is pleadable is above dispute.

I shall onely remove one Objection, which is, that though this be a Court Martiall, yet the speciall Nature of it is directed by Parliament.

To this I Answer, though the Parliament direct the Tryall as it is, yet it limits it to a Court Martiall, which cannot direct it selfe, nor is directed of its own nature by any such direction.

For to appoint a Court Martiall to proceed by any other Laws, than a Court Martiall can, — is a repugnancy in *Natura rei*.

So that as such Court Martiall retains it's proper Lawes and Jurisdictions for the support of it self; so the pleas and liberties incident to that cannot be denyed the Prisoner.

That Quarter, and such Quarter as I had given, is a good plea for life to a Councell of War, I shall not endeavour so much to evince by Authors (that being the proper work of the learned in Civil Lawes) but by such way as that which we call *iur gentium*, is proved by common practice, and strong reason.

For the first I shall not need to bring any Forraign instances, being before you whose experiences hath made this thing familiar to you; and I beleve you will agree with me, That I am not onely the first Peer, but the first Man, tryed by a Court Martiall after Quarter given; unlesse some matters *ex post facto*, or subsequent to such Quarter, brought them within the examen of such Court Martiall.

And (as I am informed) upon the great Tryall of the Earle of Cambridge, Lord Capell, Earle of Holland, &c. that plea of Quarter being thoroughly urged, it was onely avoyded upon this ground, That it was no good Plea against a Civill Jurisdiction,

diction, there being no colour of dispute, but tacitely admitted & concluded, that it was a good plea against a Military jurisdiction.

And though the Lord *Capell* and Lord *Goring's* quarter seemed to have some advantage, as being given by the Generall, and by way of Articles, yet that quarter given to the Earle of *Cambridge* was given him by a particular Captain, and that quarter, as quarter considered, as strong as the other, only both avoided by the civill jurisdiction in the high Court of Justice.

It being a rule in war, that quarter hath as much force being given in action, as Articles have in a Cessation, both irreversible by any Military power.

And though it may be a received opinion in politiques, that no Generals or souldiers concessions should prejudice the States interest, yet they shall be barrs to their owne power.

I confesse I love the laws of Peace more then those of war, yet in this case I must adhere to those of war.

And I would only know, whether a quarter was given me for a benefit to me, or for a mischief; if for a benefit, I am now to have it made good; if for a mischief, then it destroys the faith of men in arms.

And I have read this for a maxime of war, that promises made by Kings, or States Commanders, ought to be observed inviolably, else there never will be any seeking.

And I shall lay this before you as a Rule, that quarter given by the meekest souldier (if not forbidden) obliges as farr as if the Generall had done it.

And I never read or heard, that any Souldiers received to mercy, were (after 12 howies respit) ever denied quarter, or tried by a Court Marshall.

It may be objected then, that it may rest in the power of no private souldier by giving quarter to pardon treason.

To that I say, I pleaded it not as an absolute pardon, but as a barr to a Court Marshall.

I shall infer further from conclusions of reason.

The profession of a souldier hath danger enough in it, and hee
need

need not add any to it, to destroy the right of arms. I am before you as a Court Marshall, it may be all of you, or most, have in some action or other since these troubles began, received quarter for your lives, and would it not be hard measure that any Court Marshall should try you afterwards.

If this quarter be soyled or nulled, all the Quarter, Articles, termes or conclusions made since the warr began may be examinable by any subsequent Court Marshall, nay, by this the sword, the Law of Armes, all Millitary interest, and your owne safety, are judged and jeopardd as well as mine.

But I shall not multiply, presuming you will not judge by the laws of war, in which capacity only you sit; and that you will in Religion and Iustice allow that plea which is universally, even in all parts of the world allowable.

If you are dissatisfied, I pray that as an essentiall to Iustice I may have a Doctor of the Civill Law assigned mee, or at least Liberty to produce their books and opinions.

And that in the interim you suspend your sentence

Touching my levying forces in the Isle of *Man* and invading *England*, I might plead my self (and that truly) a stranger to all the Acts of Treason, and in particular to the Act of the 12th. of *August*, — And that the Isle of *Man* is not particularly named in any of the Acts of Treason, and not being particularly named, those Acts reach not, nor bind those of that Island, — And in particular, that I was in the Isle of *Man*, when the last Act was made. And the Law looks not backwards; — And whilst I was in *England*, I was under an unlikelihood and impossibility of knowing the new Acts, which I leave to judgement. But because I have, as to my Fact, confessed and submitted to the Parliaments Mercy,

I do, as to your Military power, earnestly plead Quarter, as a Bar to your further tryall of me. And I doubt not but you will deeply weigh a point so considerable, both to your concernments and Consciences, before you proceed to Sentence.

And admit my Appeal to his Excellency the Lord Generall Cromwell, on this single point.

To the Right Honorable his Excellency the Lord Generall Cromwell.
The humble Petition of James Earle of Derby, a Sentenced prisoner in
Chester.

Shewing,

THat it appeareth by the annexed what Plea your Petitioner hath urged for life, in which the Court Marshall here were pleased to overrule him, it being a matter of Law, and a point not adjudged nor pretended in all this war: And the plea being only capable of appeal to your Excellency, whose wisdom will safely resolve it; and your Petitioner being also a prisoner to the High Court of Parliament in relation to his rendition of the Isle of Man.

In all he most humbly craves your Excellencies Grace, that he may as well obtain your Excellencies judgment on his plea, as the Parliaments mercy, with your Excellencies favour to him, and he shall owe his life to your Lordships service,

And ever pray, &c.

DERBY.

To that objection, that a private Officer cannot give quarter for life, is oppose the constant customes of men in arms in all Nations, and the particular warrant of the civill Law in that behalfe. One particular case was prest by his Lordship, and presented to his Excellency the Lord Gen. Cromwell:

A Case wherein six private Souldiers gave quarter to six thousand of the enemy, among whom were the chiefest Officers of the enemies Army, the Generall only excepted.

IN the year 1631. The prince of Orange being with the States Army at Bergen ap Zoome, to prevent the enemy of a designe of Landing in some part of Zealand, or some of those lesser Islands that divide it and Holland, the enemy being shrouded and distracted, and so forc'd a shore, half a dozen private Souldier of the Princes Army came to the place, to whom 6000 and a bove gave themselves prisoners; and the quarter was made good unto them, and they allowed to their Ransomes by the Prince of Orange, notwithstanding he was with his Army on a very hasty march, with an intention to have cut them all off, in regard there was no quarter given by Water, nor any certaine ranfome. In which businesse above three hundred Officers were prisoners. This Case is attested by

Foulke Honncks.

Tho. Alcock,

Colonel Cromwell and Mr. Hugh Peters were present at this Action.

Whereas

Whereas further it has bin objected against the said Earle of *Derby*, that he kild one Capitaine *Boote* at the taking of *Boulton*; for his vindication, from that imputation, he produced an Affidavit of a man of good repute voluntarily taken before Doctor *Ayles* in the Chancery, in the year 1647. as followeth.

Peter Cropper of Bickerstaffe in the County of Lancaster Gentleman, maketh Oath, That about the latter end of the Month of *May*, in the year 1644. at the time when Prince *Rupert* took the Town of *Bolton* in Lancashire, by assault; he this Deponee, being there present, saw the now Earle of *Derby* neer unto the Cross in *Bolton*; and it being rumored then, that the said Earle had slaine one *Boote*, that had bin once his Porter, he looked and saw the said *Boote* wounded, but not dead; and soon after, one Col. *Clifton*, since deceased, standing by, with his sword ran the said *Boote* through once or twice, saying, If thou have not enough, thou shalt have more, or words to that effect; upon which the said *Boote* fell down dead; and he further saith, that this killing of the said *Boote*, was above an hour before the said Town was taken, or any generall Quarter given; for that the Princes Souldiers did pursue those in the Town above an hour after the said *Bootes* death, before they ceased, and gave Quarter.

*In the presence of Edward
Stockley Gentleman.*

Peter Cropper, *Jurat* 12 die
Maii 1647.

ROB. AYLET.

Besides this, a Gentleman of Honour and Repute, Colonel *Russell*, attested voluntarily before his Excellency the Lord Generall, that the Earle of *Derby*, at the taking of *Bolton*, charged with Prince *Ruperts* Life-guard, who entred the Town next to the Forlorn hope, and that Quarter was not given of an hour and half after; so that if the Earle of *Derby* killed *Boote*, it must needs be in the height of the storm, *Boote* being killed at the first entrance.

Upon the whole is is submitted to his Excellency the Lord Generall, and the Councell of the Army, whether the Earle of *Derby* being a prisoner of war, after quarter given by a Cap^l. of the L. Gen. own Regiment, may be Sentenced to death by a Court Martiall.

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